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Supreme Court, U.S.
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No. 96-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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February 14, 1997

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
1. The RCRA standard for assessing effects on interstate commerce is distinct from those of the dormant Commerce Clause	2
2. The Fourth Circuit has applied the dormant Commerce Clause to strike down a federally approved state program	4
3. Because Section 271.4(a) supplies the applicable standard, the Fourth Circuit erred in applying dormant Commerce Clause analysis	7
CONCLUSION	10
SUPPLEMENTAL APPENDIX	SA-1

TABLE OF AUTHORITIES

Cases Page

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 8

Chemical Waste Mgmt. v. Hunt, 504 U.S. 334 (1992) 2

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 2

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 1

Gade v. National Solid Wastes Mgmt. Assoc., 505 U.S. 88 (1992) 7

Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981 (1st Cir. 1995) 10

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 1, 8

Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994) 1, 3, 8

South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) 8

White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983) 1, 8

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 1

Constitutional Provision

U.S. Const. art I, § 8, cl. 3 ..... *passim*

Federal Statutes

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601-9675 (1995) 6

Section 104(c)(9), 42 U.S.C. § 9604(c)(9) 6

Occupational Safety and Health Act, 29 U.S.C. § 667(b) 7

Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6901-6992k (1995) 1

Section 3006, 42 U.S.C. § 6926 ..... 1, 5, 7

TABLE OF AUTHORITIES—Continued

Federal Regulations and Related Materials	Page
40 C.F.R. § 271.3 (1996)	6
40 C.F.R. § 271.4 (1996)	*passim*
40 C.F.R. § 271.22 (1996)	6, 9
40 C.F.R. § 271.23 (1996)	6, 9
40 C.F.R. § 302.4 (1996)	10
40 C.F.R. § 401.15 (1996)	10
50 *Fed. Reg.* 46,437 (Nov. 8, 1985)	2
59 *Fed. Reg.* 60,910 (Nov. 29, 1994)	4
60 *Fed. Reg.* 42,046 (Aug. 15, 1995)	4, 5
Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (December 23, 1988)	6
State Statutes	
1990 South Carolina Act No. 590 (June 7, 1990)	4
S.C. Code Ann. § 44-56-60	4, 5
S.C. Code Ann. § 44-56-60(a)	4, 5
Miscellaneous	
Letter from Greer C. Tidwell, EPA Regional Administrator for Region IV, to Michael D. Jarrett, Director of South Carolina Department of Health and Environmental Control ("DHEC") (July 6, 1989)	6
Letter from Greer C. Tidwell, EPA Regional Administrator for Region IV, to the Hon. Carroll A. Campbell, Jr., Governor of South Carolina, (May 10, 1990)	7

PETITIONERS' REPLY BRIEF

The Environmental Protection Agency ("EPA") expressly approves certain state laws affecting interstate movement of hazardous waste that the dormant Commerce Clause would otherwise prohibit. Its regulation to that effect implements the so-called "consistency" provisions of Section 3006 of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6926 (1995). Specifically, the Agency's rule provides authorization for state laws that do not "*unreasonably* restrict[], impede[], or operate[] as a ban on the free movement" of waste across state borders. 40 C.F.R. § 271.4(a) (emphasis added). By contrast—as respondent Environmental Technology Council ("ETC") thoroughly recites (Resp. Opp. 6-9, 16-17)—the dormant Commerce Clause generally creates a "virtually *per se* rule of invalidity" as to differential treatment of commerce based on state origin. *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Respondent itself concedes that the requirements of 40 C.F.R. § 271.4 are "different from the standards that a court would apply if asked to determine whether a state law improperly discriminates against interstate commerce." Resp. Opp. 13.

Because the RCRA criteria administered by EPA allow what the Commerce Clause would prohibit, under this Court's precedents the dormant Commerce Clause is displaced and the RCRA standard governs in its stead. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994) (differences between administrative standard and dormant Commerce Clause standard that are "[s]ufficiently clear" may "rule out judicial dormant Commerce Clause analysis"); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 (1983) (discrimination in city's spending of federal funds permitted where "affirmatively sanctioned by the pertinent regulations of those programs"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 156 (1982) (dormant Commerce Clause review unnecessary where it would "dupli-

cate the administrative review called for by the congressional scheme"); *cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In suggesting that the Fourth Circuit's refusal in this case to give effect to these precedents does not merit this Court's review, respondent ETC essentially puts forward three points. The first is that the RCRA-derived standard might not actually be different from those supplied by the dormant Commerce Clause. Another is that EPA has not actually approved the South Carolina laws at issue. And the third—made although respondent ETC has not challenged the validity of EPA's rule—is to imply that Section 271.4 may not be a permissible implementation of RCRA. Each of these points finds at least an echo in the Fourth Circuit's opinion. Each is unsupportable. This case squarely presents each of the questions posed by the petition, including the question of statutory displacement of the dormant Commerce Clause.

1. ***The RCA standard for assessing effects on interstate commerce is distinct from those of the dormant Commerce Clause.***

The plain terms of Section 271.4(a) create a standard of "reasonableness" distinct from the dormant Commerce Clause standards. And there can be no doubt that EPA has acted on the understanding that the RCRA standard is different in its application. By way of example, in acting on South Carolina's proffered hazardous waste program in 1985, EPA expressly approved the State's imposition of different fees for disposal of in-state and out-of-state waste. *See* 50 Fed. Reg. 46,437 (Nov. 8, 1985), Pet. App. 110a-122a, discussed in the Petition at 6 n.1, 25-26. In contrast, this Court has held that such differential fees violate the dormant Commerce Clause. *Chemical Waste Mgmt. v. Hunt,* 504 U.S. 334 (1992).

Moreover, in the 1985 proceedings before EPA, respondent (then using its former name, "Hazardous Waste Treatment Council") had explicitly challenged South

Carolina's differential fee on the ground that "the disparity [in the fees] in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a)." Pet. App. 116a. EPA's response was unequivocal:

> EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

Pet. App. 117a.

Regarding the interpretation and application of the RCRA standard, the Fourth Circuit did note that, in its view, "EPA's position on what constitutes 'reasonableness' has changed over time." Pet. App. 14a. That may well be true, but it does not show that EPA would equate the RCRA standard with a dormant Commerce Clause criterion. The explicit circumstances respecting South Carolina's program are proof to the contrary. Thus, ETC's professed ignorance as to "[w]hether a particular law might be approved as 'consistent' by EPA, though it would fail to meet the [dormant Commerce Clause] standards," Resp. Opp. at 13, is unconvincing and not grounds for denying certiorari. The conflict is real, and ripe for consideration by this Court.[1]

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[1] *Compare Northwest Airlines, supra*, 510 U.S. at 367 (where the Court did not "have the benefit of the Secretary's reasoned decision concerning the [statute's] permission for the charges in question"). Here, EPA has promulgated and applied a standard at odds with those of the dormant Commerce Clause.

2. The Fourth Circuit has applied the dormant Commerce Clause to strike down a federally approved state program.

Drawing upon a brief filed in 1991 (at the preliminary injunction stage of this case) by the United States as *amicus curiae*,[2] respondent ETC asserts repeatedly that "EPA has not expressly approved any of the contested South Carolina laws." Resp. Opp. at 12; *see also id.* at 11 n.8 and 13-15. This assertion echoes that of the Fourth Circuit, Pet. App. 17a, but it is outdated and wrong. First, while the challenged South Carolina laws were adopted after the State's initial RCRA approval was granted in 1985, *see* Petition at 6, the State's RCRA approval was extended in 1994 and 1995, while this case was pending before the district court and the court of appeals. EPA's extension of approval in November 1994 involved state regulations which are not at issue here. *See* 59 *Fed. Reg.* 60,910 (Nov. 29, 1994). However, as was pointed out to the Fourth Circuit, in 1994 South Carolina submitted a set of program revisions which included, for example, S.C. Code Ann. § 44-56-60. That statute is at issue in this case; subsection (a) codifies the State's hazardous waste landfilling restrictions enacted in Act No. 590. *See* Petition at 8; Pet. App. at 131a-132a. On August 15, 1995, EPA acted on that submission and concluded that the State's "hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization," and it "approve[d] South Carolina's hazardous waste program revisions." 60 *Fed. Reg.* 42,046 (Aug. 15, 1995). In approving the various

[2] This brief of the United States as *amicus curiae* was filed in the Fourth Circuit and in this case, albeit nearly six years ago. Thus, it may be technically correct for respondent ETC to make references to that brief by saying "[a]s the United States discussed in the court below, . . ." Resp. Opp. 12 n.9, and "EPA itself . . . took the position in this case. . . ." *Id.* at 13. Nonetheless, if and to the extent that such references suggest that the United States' *amicus* brief was filed during the Fourth Circuit's consideration of the decision now before the Court, that would be wrong.

program revisions, EPA relied upon S.C. Code Ann. § 44-56-60 ten times, and three times specifically cited § 44-56-60(a), the provision containing the challenged cap on overall disposal by burial in the State. 60 *Fed. Reg.* at 42,047, 42,048, 42,049, 42,050, 42,053, 42,054, 42,060, 42,066 (checklists 14, 17E, 17S, 23, 24, 36, 44A, 44B, 77, and 87).[3] The six-year-old *amicus* brief of the United States that ETC has lodged with the Court could not reflect these developments and should be given no weight.[4] More properly, as the Fourth Circuit

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[3] The Fourth Circuit acknowledged the 1995 RCRA approval, Pet. App. 10a & n.11. It commented that the approval by EPA of a particular checklist item (17E) relating to "location standards for salt domes, salt beds, underground mines and caves" could not be viewed as a finding by EPA regarding "the overall limit on hazardous waste burial and the ceilings and floors in question." *Id.* at n.11.

However, the Fourth Circuit did not address the fundamental point of EPA's 1995 action. The amended Section 44-56-60(a) before EPA in 1995 contains the cap on disposal struck down by the district court, and that cap applies to land disposal generally, which would include disposal in salt domes as well as landfills. EPA approved the provision without expressing any view regarding interstate effects. Certainly at that time, ETC did not raise in the EPA approval proceeding any critical commentary along the lines of its present challenge. Indeed, ETC would have been imprudent from its tactical perspective to have raised the interstate-commerce consistency issue anew before EPA. It had recently prevailed in the district court on its Commerce Clause theory, and in the district court it had successfully resisted the State's motion for referral to EPA of the very same consistency question.

[4] The Fourth Circuit in its October 1996 decision made no reference whatsoever to the *amicus* brief which that same court had received from the United States in the 1991 appeal by the State from the grant by the district court of a preliminary injunction. In 1991, the United States as *amicus curiae* could, and did, state "that EPA did not approve the challenged South Carolina statutes, executive orders, and regulation in its approval of South Carolina's hazardous waste management program under section 3006 of RCRA." Brief for the United States as *Amicus Curiae* in *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991). In 1996, the United States could not, and did not, reiterate any such statement.

acknowledged, "EPA continues to approve South Carolina's hazardous waste program under RCRA." Pet. App. 10a.[5]

Also, the State provisions challenged here were put before EPA in connection with its consideration of the State's Capacity Assurance Plan in 1990. *See* Petition at 5 (discussing capacity assurance requirements of Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9604(c)(9)). In submitting its Capacity Assurance Plan, the State included or projected for inclusion all the provisions challenged by ETC. In 1989, acting pursuant to its policy of using the CERCLA capacity assurance process to address "State actions which may be inconsistent with the federal [RCRA] program," EPA formally requested that the State demonstrate its compliance with Section 271.4(a) in light of the challenged provisions. EPA Policy Memorandum of Dec. 23, 1988 (Pet. App. 123a); Letter from Greer C. Tidwell to Michael D. Jarrett (July 6, 1989) (citing Section 271.4(a) and stating that "[i]n order for South Carolina to maintain final authorization it must continue to meet the consistency requirements of RCRA" (Reply Supp. App. SA-1).[6] South Carolina responded to EPA's

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[5] In fact, the State makes a biannual report to EPA of the status of its hazardous waste regulatory program and notes any changes that have been made in that program over the preceding six months. The State makes that report precisely because the program is approved by EPA and it has "final authorization" within the meaning of 40 C.F.R. § 271.3. EPA can and does pose questions about the program that might arise. In all events, EPA has had notice of the changes to South Carolina's program.

Under EPA's regulations, it may initiate proceedings *sua sponte*, or on petition from an interested person, to withdraw approval of the State program for "alleg[ed] failure to comply with the requirements of this part [EPA's rules] as set forth in § 271.22." 40 C.F.R. § 271.23(b)(1).

[6] This letter was part of the record of the case in the district court and in the court of appeals. It has been reprinted as an appendix to this reply brief, and thus has been cited as "Reply Supp. App."

request with an appropriate legal opinion, and on May 10, 1990, EPA "formally approve[d] South Carolina's Capacity Assurance Plan." Letter from Greer C. Tidwell to the Hon. Carroll A. Campbell, Jr., Governor of South Carolina (May 10, 1990) (Reply Supp. App. SA-4). And, again, since receiving the State's response EPA has maintained and extended the State's RCRA approval.

Thus, South Carolina has, both before and after adopting the laws at issue here, continued to operate a federally approved RCRA program. Under the terms of RCRA, such state programs operate "in lieu of the Federal program" and "have the same force and effect as action taken" by EPA. RCRA § 3006(b) and (d), 42 U.S.C. § 6926(b) and (d). That federally approved status must be given effect to bar "dormant" Commerce Clause analysis. *Cf. Gade v. National Solid Wastes Management Assoc.*, 505 U.S. 88, 99 (1992) (under Occupational Safety and Health Act, 29 U.S.C. § 667(b), an "approved state plan . . . displaces the federal standards.").

3. Because Section 271.4(a) supplies the applicable standard, the Fourth Circuit erred in applying dormant Commerce Clause analysis.

Although South Carolina's RCRA program continues to be federally approved, ETC's challenge to the State's program has never been considered—either by EPA or the courts—under the "reasonableness" standard created by RCRA and Section 271.4(a). That is a result of the Fourth Circuit's error, not, as ETC asserts (Resp. Opp. 12-15), a reason to let the Fourth Circuit's decision stand. The Fourth Circuit denied the State an opportunity for a hearing under the "reasonableness" standard, on the basis that Section 271.4 was binding only on EPA, not the judiciary. Thus, even if the State's laws passed muster under Section 271.4 and were approved, the Fourth Circuit opined that "we could not do so without express congressional authorization." Pet. App. 17a.

The Fourth Circuit's decision fails to give the RCRA standard its proper effect under this Court's precedents.

Section 271.4(a) by its terms regulates not simply EPA's *approvals* of state programs, but the *substance* of the programs themselves. That is, the regulation expressly governs a program's "consistency" under RCRA and thus its permissibility under federal law. If EPA's rule is valid, then under *Northwest Airlines, Merrion,* and *White, supra,* no part of the State's program can be struck down under the dormant Commerce Clause; the challenged provisions must be evaluated under the governing Section 271.4 standard.

There is no challenge to Section 271.4 in this case. But, if the Fourth Circuit had questions in that regard, it was incumbent on the court to resolve the matter explicitly, *before* addressing the dormant Commerce Clause. Instead, the Fourth Circuit undertook no analysis of EPA's RCRA-implementing regulations—whether under the doctrine of *Chevron, supra,* or any other basis. The court only determined whether, without regard to EPA's regulations, the statutory terms expressly authorized the State's laws in an "unmistakably clear" fashion. Pet. App. 12a-14a (citing *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984)). Nothing in *South-Central Timber* or any other of the Court's precedents requires or permits a court to disregard an agency's implementation of a statute it administers merely because the case implicates the dormant Commerce Clause. To the contrary, *White* and *Merrion* confirm that agency regulations and actions may displace the dormant Commerce Clause, and thus must be considered in the first instance. The Fourth Circuit was not free to find no fault in Section 271.4, and yet refuse to apply it.[7]

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[7] ETC asserts that "this Court has consistently required that the authorization to discriminate against interstate commerce come from Congress, not an agency," Resp. Opp. 11, but this postulate is presented without any citation of authority. Agency regulations must be authorized by direct or delegated exercise of Commerce Clause power; where authorized, there is no basis for assigning them a lesser effect under the dormant Commerce Clause. *Cf. A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935).

Finally, ETC's assertion that a dormant Commerce Clause issue is "not presented by this case," because there has been no proceeding before EPA to address the challenged laws under Section 271.4(a) (Resp. Opp. 13), is an ironic one. The State has sought an administrative proceeding for years, by means of a reference to EPA's primary jurisdiction. ETC has opposed such a reference and the lower courts have denied it. *See* Petition at 10-11, 28-30. ETC also chose to bring its challenge in federal court despite the availability of an administrative remedy which would have tested "consistency" under Section 271.4(a). *See* 40 C.F.R. §§ 271.22, 271.23; Petition at 29 n.20. Moreover, in bypassing the administrative forum and opposing a referral to EPA, ETC has urged the lower courts to apply dormant Commerce Clause doctrine without reaching the question as to the status of the challenged laws under the Section 271.4 "reasonableness" standard. The Fourth Circuit agreed, and has affirmed a summary judgment against the State on the grounds that the dormant Commerce Clause bars any consideration of Section 271.4. The Fourth Circuit and ETC have this analysis exactly backwards: one must first resolve the regulatory question to determine whether the dormant Commerce Clause applies at all. The error presented by the Fourth Circuit's decision is a question properly before the Court.

That question is of substantial importance for federal-state environmental regulation under RCRA and many similar statutes, and deserves review by this Court. Otherwise, claimants such as ETC will always bypass the prescribed administrative process in favor of a dormant Commerce Clause challenge, as the Fourth Circuit permitted here. And, if the courts reject requests to refer questions to the agency, as also happened here, the administrative machinery established by Congress to implement federal law will assuredly be bypassed.[8]

* * * *

[8] Referral to the agency under the primary jurisdiction doctrine is the best procedural route for obtaining the agency's views be-

Each time EPA has considered South Carolina's RCRA program—both before and after the State adopted the laws at issue here—the State has received federal approval. Conversely, the challenged provisions have never been held—either by EPA or by the courts—to be "unreasonable" under the RCRA consistency standard, a standard which under established precedent should displace dormant Commerce Clause analysis. Nonetheless, summary judgment has been entered against the State, with the unprecedented result that a federally approved state program has been struck down under the *dormant* Commerce Clause. A grant of certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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cause it ensures that a considered decision of the agency itself will be obtained. In *Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1st Cir. 1995), the First Circuit was faced with the question whether ferric ferrocyanide was one of the "cyanides" within the meaning of EPA regulations codified at 40 C.F.R. § 401.15 and 40 C.F.R. § 302.4, Table 302.4. A brief on the question was submitted by the United States as *amicus curiae*, but the court of appeals rejected the position urged in the *amicus* filing even while agreeing that the question was one that "must be left to the EPA." *Blackstone Valley Elec.*, 67 F.3d 988. The court explained why it was ordering referral rather than accepting a regulatory-framework argument proffered in the *amicus* filing:

> we are not persuaded [by the regulatory framework argument], for a number of reasons. The regulatory text itself does not support the argument; the argument leads to results which are overbroad and defy common sense; the EPA itself has taken inconsistent positions; the position is articulated solely and for the first time in a litigation posture; and policy reasons dictate against the approach proposed by the EPA.

Id.

Respectfully submitted,

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February 14, 1997

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SUPPLEMENTAL APPENDIX

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4WD-RCRA

Mr. Michael D. Jarrett, Director
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Dear Mr. Jarrett:

This letter is in regard to enactment of Executive Order 89-17 which prohibits commercial hazardous waste treatment or disposal facilities in South Carolina from accepting hazardous wastes generated in another state which prohibits the treatment, storage, or disposal of hazardous wastes within its own borders, or which fails to comply with 42 U.S.C. § 9604(C)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended.

Section 3006(b) of RCRA requires that authorized State programs must be "consistent" with the Federal program and other state programs. It is EPA's position that the impact of the South Carolina Executive Order may render the South Carolina hazardous waste management program inconsistent. Pursuant to 40 C.F.R. 271.4(a):

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

In order for South Carolina to maintain final authorization it must continue to meet the consistency requirements of RCRA. Enactment of the Executive Order subjects South Carolina to the withdrawal criteria found at 40 C.F.R. 271.22.

Therefore, the Agency is requesting, as provided at 40 C.F.R. 271.21(d), that the State provide:

1. A certified copy of the Executive Order and House Bill 332.
2. A supplemental Authority General's statement, including the State's certification that the Act is equivalent, consistent and not less stringent than the federal and other authorized state programs;
3. A supplemental program description addressing the intent and effect of the Act's provisions on the operation of commercial hazardous waste facilities in the State of South Carolina; and
4. Responses to the following information requests addressing the intent and effect of the Act's provisions on the operation of commercial hazardous waste facilities in the State of South Carolina.

Information Requests

A. Please state the basis in human health or environmental protection of the Act.

B. How will the Act impact South Carolina's ability to enter into inter-state agreements or compacts?

C. What criteria will be used in determining which states will be listed by the Department?

Also, please provide a copy of the transcripts on the Legislative proceedings of South Carolina House Bill 322 in the South Carolina General Assembly.

The above-requested documents and information should be submitted to EPA—Region IV within thirty (30) days of your receipt of this letter.

If you have any questions or need further clarification, please do not hesitate to contact me.

Sincerely yours,

Original signed by

Greer C. Tidwell
Regional Administrator

bcc: Suzanne Rudzinski, HQ SPB
Alvin Lenior, ORC
Carl Terry
Loretta Hanks, OCEA
Judi Kane

HERBERT:cdw:6/13/89 DOC: JARRETT-M.D.S.C.

HERBERT

/s/

JOHNSON

/s/

SCARBROUGH

/s/

TOBIN

/s/

TIDWELL

[Logo]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 Courtland Street, N.E.
Atlanta, Georgia 30365

Honorable Carroll A. Campbell, Jr.
Governor of South Carolina
State Capitol
Columbia, South Carolina 29211

Dear Governor Campbell:

We have completed our review of South Carolina's Capacity Assurance Plan (CAP) submitted on October 17, 1989 in fulfillment of Superfund Amendments and Reauthorization Act (SARA). SARA Section 104(k) requires each state to assure adequate hazardous waste management capacity for all hazardous waste generated in the state for the next 20 years as a condition for remedial action Superfund monies after October 17, 1989.

I am writing to formally approve South Carolina's Capacity Assurance Plan with the condition that additional information on mixed waste and wastewaters be submitted in October 1991. Your 1989 plan does not include information on the quantity and type of mixed waste and on-site facilities. Because we consider these additional conditions minor, they do not affect Superfund monies available to the state. We will make arrangements with the South Carolina Department of Health and Environmental Control to obtain the additional information as part of your approval.

I would like to take this opportunity to thank you and your staff for the excellent work that went into preparing this document and the interstate agreement negotiated by the five Region IV states. South Carolina's leadership was instrumental in developing the agreement and I am hope-

ful that the process will continue to evolve and eventually include all of the sister states in the southeast.

The efforts and cooperation of you and your staff reflect South Carolina's deep commitment to solving the hazardous waste management issue which is one of our most pressing environmental concerns. Many thanks to all who participated in this difficult but crucial process.

Sincerely yours,

/s/ Greer C. Tidwell
GREER C. TIDWELL
Regional Administrator

cc: R. Lewis Shaw

May 10, 1990